LORRAINE WOLHUTER

MINOR DISSERTATION: LLM

CRIMINOLOGY AND CRIMINAL JUSTICE

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SUPERVISOR: PROF LEEMAN

# A SOCIO-CULTURAL AND COMPARATIVE ANALYSIS OF THE DOCTRINE OF MISTAKE IN CRIMES REQUIRING INTENTION

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## PREFACE

Academics have often been criticised for their preoccupation with theoretical abstraction and logical deduction and their concomitant failure to address issues of practical importance or exigency. It must therefore be stated at the outset that the recommendations contained in this paper are not confined to a theoretical analysis of the doctrine of mistake. Per contrast, they are motivated by a genuine concern on the part of the writer to alleviate the present discord between South African criminal legal theory and socio-cultural reality. These recommendations are premised upon the advantages of the reception of the normative approach to criminal liability in South Africa, and they have been iterated elsewhere[1] by the writer in the context of, *inter alia*, the defence of necessity.

The submissions that constitute the core of this paper must, however, be regarded as subject to the following qualification. A successful reception of the normative approach necessitates a change in the existing power relations that are operative in South African courts. To leave its application to the presiding judge and assessors would be to give them the freedom to inflect their decisions with their personal values and prejudices. It has been argued elsewhere[2] by the writer that this problem may possibly be solved by the re-introduction of the jury system, suitably loaded to cater for the interests operative in the case. Sustained reflection and exposure to the exigencies of practice has, however, yielded the conclusion that the difficulties that accompanied the jury system and the suspicion with which it was viewed, outweigh any advantages that its re-introduction may have. A possible alternative, and one which, it is submitted, would work well in practice, is the increased use of expert witnesses at the stage prior to conviction, provided that they are suitably qualified (either formally or informally) to adduce

evidence on the *socio-cultural* matrix of relations in which the accused in question lives and moves.

In the context of mistake of law, for example, evidence concerning, *inter alia*, the level of legal knowledge and general education in a particular community could be adduced by persons who are either long-standing members or active participants in the socio-cultural life of such community. The theoretical views and preferences expressed in this paper should thus be read with the above-mentioned practico-social problems in mind.

## A. INTRODUCTION

The intrinsic nature of the concept of mistake problematises its relation to the general principles of criminal liability. The essence of the problem may best be illustrated by distinguishing between the notion of mistake and the notion of accident. For Fletcher, the difference between accident and mistake resides in the fact that whereas the former occurs in the realm of causation, the latter occurs in the realm of perception. While the results of blind causal processes are universally regarded as non-culpable, misperceptions are not.[3] The question is thus to what extent individual misperceptions ought to be allowed to supercede the dictates of the law. It will be argued in what follows that any answer to this question, however theoretically sound, inevitably involves considerations of legal policy and hence results in the inflection of the law with a particular value judgment.

The comparative analysis that constitutes the core of this paper will be prefaced by a discussion of the theoretical models, viz the psychological and normative theories of criminal liability, that inform the position accorded the doctrine of mistake in the various jurisdictions under review. It will be argued that the normative theory of criminal liability is both theoretically and practically superior to its nineteenth century counterpart, and that its reception in South Africa may solve some of the problems that beset a society in a state of flux.

It will become apparent from the comparative survey that informs the perspective adopted in this paper that whereas German law has adopted an approach that demands that citizens be more circumspect in relation to the provisions of the law than to the factual

situation in which they find themselves, South African law has, by adopting an entirely subjective approach to *error iuris* and *error facti*, implicitly entrenched a policy which unduly favours the wrongdoer. It will be seen further that the firm entrenchment of the maxim *ignorantia iuris non excusat* in English law, albeit viable in most practical instances, has rendered this jurisdiction unjust, inflexible and uncertain in relation to the solution of penumbral cases. It will be argued that the German approach, albeit suitably modified, is preferable and could profitably be implemented in South Africa. The advantages of its reception will be illustrated with reference to the problem of police abuse of power and to the issue of reliance on erroneous legal advice.

## B. DOCTRINE OF MISTAKE: VORSÄTZTEORIE V SCHULDTEORIE

The theoretical space accorded the doctrine of mistake in the various jurisdictions under review can best be illustrated by reference to the theories of criminal liability that underpin them. The psychological theory of criminal liability (also known as the *Vorsätzteorie* or the theory of intent) is predicated upon the so-called causal theory of an act, which is defined as follows by Snyman: "The causal theory of an act...regards the act only from the outside, that is without any reference to the state of mind of the person committing the act...(T)he act is any voluntary human conduct whereby some change, perceivable by the senses, is brought about in the outside world by means of the mechanical laws of cause and effect."[4]

The fact that the proponents of this theory regard the human act as devoid of intention or will leads them to make a strict distinction between the *actus reus* and the *mens rea* of criminal conduct. Whereas the former contains all the objective elements, the latter contains all the subjective elements of criminal liability. Since a mistake constitutes a subjective misperception on the part of the actor, it is necessarily confined to the inquiry into *mens rea*. Furthermore, since intention is defined as *dolus malus* (a guilty state of mind), knowledge of unlawfulness forms an integral part of intention. Proponents of this approach thus contend "that knowledge of the factual components of a crime and knowledge of the legal prohibition as such are equal elements within the concepts of intent or negligence. Without knowledge of the legal prohibition there is no consciousness of wrongdoing (*Unrechtsbewusstsein*). *Error iuris*, as well as mistake of fact, precludes criminal intent..."[5] Since the approach to criminal intent is

entirely subjective, any error, whether of fact or of law, and whether reasonable or unreasonable, negates intent and hence excludes criminal liability. Proponents of this approach thus deny the relevance of external factors that may influence the behaviour of the actor. Furthermore, they argue that since law is a positive science, obedience to the dictates of pure theory excludes the possibility of the inflection of the law with normative considerations or value judgments. It will be seen in the comparative survey that follows that whereas South African law adheres to the *Vorsätzteorie* in its pure form, English law adopts it only insofar as mistake of fact is concerned. In relation to mistake of law, English law has retained the antiquated maxim *ignorantia iuris non excusat*. It will be argued that South African law has, by adopting a purely psychological approach, inflected the law with a value judgment that favours the individual over the social collectivity. Per contrast, the entrenchment of the *ignorantia* rule in English law reveals the utilitarian assumptions that underpin the English legal system.

The normative theory of criminal liability (also known as the *Schuldteorie* or theory of culpability) is premised upon a general system of analysis, the core concepts of which are the following: "...*Tätbestandsmässigkeit* (viz) the state or condition of fulfilling the defined elements of a criminal offense, *Rechtswidrigkeit* (wrongfulness), and *Schuld* (culpability)."[6] This system of analysis is not embodied in the positive law but rather exists *in abstracto* in the theoretical framework of German criminal law. It exists in a relation of superiority over the laws of the land and "requires that all positive legislation conform to it."[7] Apart from the fact that its theoretical precision facilitates the existence of order, certainty and impartiality in the application of the law, this system of analysis also entrenches certain basic values that operate as guarantees for the

achievement of justice in a particular case. "The category of violation of the definition seeks to insure that the criminal justice system does not impose criminal liability without first establishing that a precise statutory rule has been broken by the perpetrator. The category of wrongfulness seeks to insure that general justificatory exceptions (both statutory and extra-statutory) militating against liability are sought, clarified, and considered in every case. The category of culpability seeks to insure that punishment does not follow on the mere showing that, objectively viewed, a rule has been violated without justification. It forces attention to the person of the perpetrator and requires special attention to the excuses he (*sic*) offers for his (*sic*) conduct."[8]

Naucke has argued that the German system of analysis evolved as a result of a particular, nationally-specific political experience viz the Third Reich, the excesses of which served to highlight the need to ensure that "(d)eviation from the accepted norms of society should not be responded to with uncontrolled violence. The first reaction, rather, should be to try to gain distance from the deviant event. This distance is attained by binding oneself to a definite and formal pattern of analysis."[9]

He argues further that despite its historically specific origins,"...the values implicit in the general system for analyzing criminal acts have a natural lawlike character that transcends national boundaries."[10] It is submitted that although Naucke correctly commends the systems analysis for its prescriptive relation to positive law, and although he rightly regards it as of useful application to other nations, he errs in attributing a 'natural lawlike' nature to the values it embodies. To argue this is to assume, albeit implicitly, that these values are static and

unchanging across time and space. Per contrast, the changes that have occurred in German legal theory in the past century illustrate that these values are not fixed but change in accordance with changes in socio-political and economic reality. Legal theory must necessarily be dynamic in order to force the positive law to adapt to and reflect contemporary values. It must also take account of the existence of competing values which have arisen as a result of heterogeneous population groups and diverse societal strata. As has been argued by Arzt in relation to the German concept of mistake of law, "(i)ncreasing stratification in society and loss of a common sense of social values make credible mistakes of law more likely, and tolerance by the law more necessary than ever."[11] It will be argued in what follows that the stringency of the test adopted by German law for an exculpatory mistake of law illustrates the above-mentioned point. The high standard of conscientiousness required from the average citizen in relation to the laws of the land obscures the fact that knowledge of these laws is often unattainable or that many laws embody values which are in conflict with those adhered to by certain strata in a heterogeneous society.

It should be apparent from the foregoing that the normative theory of criminal liability makes specific provision for the existence of value-judgments in the application of the law. The theory is predicated upon an acceptance of the finalistic theory of an act. The proponents of the finalistic theory aver that "(t)he backbone of the act is the human will, because the idea of finality is derived from the ability of the human *will* to select a goal in advance, and to direct his (*sic*) conduct towards achieving this goal."[12] "The directing of his (*sic*) will upon a certain

goal by the actor, is nothing else than his (*sic*) intention. (ie) ...the intention of the actor forms part of the *actus reus*."[13]

As soon as it is accepted that the inquiry into the *actus reus* constitutes an admixture of objective and subjective elements, it becomes clear that a strict separation between subjectivity and objectivity is theoretically unsound. Furthermore, the inquiry into *mens rea* is also a blend of the objective and the subjective. No longer is one concerned to discover the inner state of mind of the accused; per contrast, the inquiry into culpability constitutes a reproach: can the actor fairly be blamed for what s/he did?

Acceptance of the *Schuldteorie* "leads to a distinction in treatment of *error iuris* and mistake of fact."[14] Since intent forms an integral part of the human act an error relating to the definition of the proscription (*Tätbestandsirrtum*) negates intent and thus excludes criminal liability. Since the existence of a legal provision is not a causal factor that is subject to the determination of the human will, "...the ability of the human will to 'overdetermine' the causal process by intentionally selecting causal factors becomes separated from knowledge of the law. As a result, knowledge of the legal prohibition is expelled from the concept of intent as well as from the concept of negligence. ...Knowledge of the law and culpable lack of legal knowledge become separate elements within the concept of guilt, whereas intent and negligence become separate elements of the *actus reus* (*Tätbestand*). This theory sees *error iuris* as a problem not of intent but of guilt. This makes it possible to distinguish between errors concerning elements within the sphere of *actus reus* (*Tätbestand*), including intent, and errors affecting consciousness of wrongdoing, which are within the sphere of

guilt."15 Whereas a *Tätbestandsirrtum* excludes intent whether it is reasonable or unreasonable, a *Verbotsirrtum* excludes criminal liability only if the actor cannot fairly be blamed for making the error. The test developed by the German theorists in this regard is known as the *Unvermeidbarkeitsdoktrin*. The actor is excused if s/he could not have avoided the error; if, however, the error was avoidable with the exercise of due conscientiousness, the actor is not excused but his/her punishment may be mitigated. As has been argued by Snyman, "(t)he normative theory of culpability leads one to the view that ignorance of the law ought not invariably to be regarded as a defence. If the ignorance was avoidable or unreasonable or if X *should* have been aware of the relevant legal rule, there are grounds upon which he (*sic*) can be blamed. This is the reason why according to this theory actual knowledge that the act is forbidden by law is not required."16

Arzt has argued that "(t)he primary achievement of the *Schuldtheorie* lies precisely in its theoretical justification for treating *error iuris* as a weaker defense than mistake of fact. The key here is understanding the function of intent as defined by this theory: intent is purged by considering consciousness of wrongdoing an element of guilt, not of intent. Intent serves as a warning to the perpetrator that his (*sic*) intended act might be unlawful. (*Warnfunktion des Tätbestandsvorsätzes*) In contrast to mistake of fact, which excludes intent, in mistake of law the defendant has a specific reason for checking carefully what he (*sic*) is about to do, namely his (*sic*) knowledge that he (*sic*) is about to harm the life, property, or freedom of another being, actions which generally are prohibited."17

The *Schuldteorie* in its pure form, as outlined above, has not found application in modern German law since the rigour of its theoretical precision has caused injustice in penumbral cases. Instead, a more lenient form, the *Eingeschränkte Schuldteorie,* has emerged as a practical compromise. The differences between the two theories will be illustrated in section D.2. *infra.*

## C. SOUTH AFRICAN LAW

### 1. THE ROMAN-DUTCH TRADITION

It appears from a survey of the old authorities that there is a marked affinity between the Roman-Dutch common law and the modern German approach to mistake of law. Snyman provides the following summary of the views of the major Roman-Dutch jurists: "Although the common-law authorities are not in complete agreement on the subject, the overall impression one gets from a reading of their opinions is that ignorance of the law did constitute a defence, provided it was unavoidable. Thus Grotius, Zoesius and Merula acknowledge ignorance of the law as a defence, provided it is unavoidable....Voet states that ignorance of the law excuses...any person in respect of a crime requiring *dolus*, but immediately afterwards he contradicts himself by saying that those who are ignorant of the law usually merely receive a lighter punishment, since they are not free of negligence...In my opinion, Voet's views must be interpreted as follows: ignorance of the law is only an excuse if it is not due to negligence."[18]

## 2. THE PRE-DE BLOM ERA

Prior to the watershed decision in *De Blom*, South African law adhered to a strict distinction between mistake of fact and mistake of law. As far as the former was concerned, it was held in *R v Mbombela 1933 AD 269* at 272 that "(m)istake of fact, in order to be a defence in criminal law, must not only be a *bona fide* belief, but must also be a reasonable belief." Per contrast, the maxim that ignorance of the law is no excuse precluded the existence, in principle, of a defence of mistake of law. This maxim received approval by the Appellate Division in *Werner* in a case of murder.[19] The courts did, however, unconsciously excuse a mistake of law "waar die beskuldigde onder 'n sogenaamde 'claim of right' opgetree het, selfs al het die onkunde indirek voortgespruit uit onkunde aangaande die bepalings van 'n wet."[20]

In essence, therefore, the position in South African law prior to *De Blom* accorded with the current English approach to mistake. The only notable difference was that a mistake of fact had to be reasonable in order to exculpate, a rule which has in any event recently been gaining ground in English law.

## 3. DE BLOM AND AFTER

In *S v De Blom 1977 (3) SA 513 (A)* (the *locus classicus* on mistake of law) the accused was charged with a contravention of the Exchange Control regulations because she had taken money and jewelry out of the country without the requisite permission. It was contended on her behalf that she had, at the relevant time, been unaware of the provisions embodied in the regulations. The court, per Rumpff CJ, was of the view that "(i)n hierdie stadium van ons regsontwikkeling moet dit aanvaar word dat die cliché dat 'every person is presumed to know the law' geen grond vir bestaan het nie en dat die opvatting 'ignorance of the law is no excuse' regtens nie van toepassing kan wees nie in die lig van die hedendaagse skuldbegrip in ons reg..."(529H) Having thus rejected the maxim, the learned judge formulated the law applicable to a defence of ignorance of the law as follows:

> "In 'n saak soos die onderhawige moet aanvaar word dat wanneer die Staat getuienis voorgelê het dat die verbode handeling begaan is, 'n afleiding gedoen kan word, na gelang van die omstandighede, dat die beskuldigde willens en wetens (dws ook met onregmatigheidsbewussyn) die handeling begaan het. Indien die beskuldigde op 'n verweer wil steun ...dat sy nie geweet het dat haar handeling onregmatig was nie, kan haar verweer slaag indien van die getuienis as geheel afgelei kan word dat daar 'n redelike moontlikheid bestaan dat sy nie geweet het dat haar handeling onregmatig was nie; en verder,

> wanneer slegs *culpa* en nie *dolus* alleen as *mens rea* vereis word nie, daar ook 'n redelike moontlikheid bestaan dat sy nie juridies geblameer kan word nie, dws dat wat al die omstandighede betref, dit redelik moontlik is dat sy met die nodige omsigtigheid te werk gegaan het om haar op hoogte te stel van wat van haar verwag word in verband met die vraag of toestemming om geld uit te neem nodig is of nie. Sou daar op die getuienis as geheel, dws insluitende die getuienis dat die handeling gepleeg is, 'n redelike twyfel bestaan of daar wel *mens rea* ...by die beskuldigde bestaan het, sou die Staat sy (*sic*) saak nie sonder redelike twyfel bewys het nie."(532E-H)

The decision in *De Blom* is thus authority for the view that *bona fide* ignorance or mistake of law, whether or not it is reasonable, negates intention and hence exculpates in the case of offences requiring intention. In crimes of negligence the mistake must be reasonable in order to exculpate. It remained uncertain, however, whether the ambit of the judgment extended to mistakes of fact.

The approach to mistake of fact was clarified a few years later in *S v Sam 1980 (4) SA 289 (T)*. The court referred to *Mbombela* and held that it had been superceded by the decision in *De Blom*. The learned judge proffered the following exposition of the current approach to the issue of mistake:

> "In *S v De Blom*...het die Appélafdeling baie onsekerhede uit die weg geruim. In daardie saak het dit gegaan oor

> *error iuris*, maar is na my oordeel ook gesag daarvoor dat daar, by die beoordeling van wederregtelikheids-bewussyn, geen verskil tussen *error iuris* en *error facti* getref behoort te word nie. ...Op gesag van die genoemde gewysdes is dit na my oordeel so dat by 'n misdaad waar opset (*dolus*) 'n vereiste is moet die Staat bo redelike twyfel wederregtelikheidsbewussyn bewys. Of die feitedwaling redelik of onredelik is, is nie ter sake nie omdat die toets subjektief is. Die begrip van redelikheid of onredelikheid, en die graad daarvan in die omstandighede en feite van elke saak, kom alleen ter sprake by die bewyslewering of die beskuldigde wel *bona fide* gedwaal het al dan nie. Dit raak nie die regsbeginsel as sodanig nie. Dit geld in beide gemeenregtelike en statutêre misdrywe waar *dolus* 'n vereiste is."(294C–E)

Visser and Vorster have argued that "(t)he cumulative effect of (*De Blom* and *Sam*) is to confirm that the crucial question is not whether the accused's mistake was one of fact or law, but whether the accused lacked knowledge of unlawfulness as a result of his (*sic*) mistake."[21]

The concept of knowledge of unlawfulness was subjected to judicial scrutiny in *S v Magidson 1984 (3) SA 825 (T)*. Having referred with approval to the views of De Wet and Swanepoel in this regard, the Court delineated the concept as follows:

> "*Dolus* ... also requires knowledge of the unlawfulness of the act. ...Such actual knowledge, however, may also be by

> way of *dolus eventualis*. It is also not necessary that the accused must be aware that he (*sic*) is contravening a specific section of a specific Act. It is sufficient if he (*sic*) knows that what he (*sic*) is doing is unlawful. Nor does the accused have to be certain that what he (*sic*) is doing is unlawful. It is sufficient if he (*sic*) realises that what he (*sic*) is doing may possibly be unlawful and reconciles himself (*sic*) with this possibility."(830A–C)

Knowledge of unlawfulness is therefore an essential element of criminal liability in South African law. The fact that the accused ought reasonably to have had the requisite knowledge is insufficient for the imposition of liability in crimes requiring intention, although it suffices in the case of crimes requiring negligence.

It should be apparent from the foregoing that the South African law of mistake constitutes an exact reflection of the psychological theory of criminal liability discussed *supra*. This slavish devotion to a theory which has been abandoned in its country of origin (viz nineteenth-century Germany) has resulted in the implicit adoption of a value-judgment that unduly favours the wrongdoer and hence emphasises individual liberty at the expense of social responsibility. It has also led to a number of judicial decisions which are either theoretically unsound or procedurally problematic in instances where the logical application of the law would cause manifest injustice. (This point will receive further elaboration in the discussion in section G *infra*.)

## 4. ACADEMIC VIEWS AND NEIGHBOURING JURISDICTIONS

A survey of academic opinion concerning the approach that ought to be adopted in relation to the issue of mistake yields the conclusion that the jurists are fairly evenly divided. On the one hand, theorists such as Snyman, Van der Merwe and Stassen are firm supporters of the normative approach to the problem. Stassen's view constitutes a cogent exposition of the normative standpoint. He argues that it is highly probable that the courts will in many instances be unable to determine beyond reasonable doubt whether or not the accused acted with knowledge of unlawfulness. He remarks further that "(d)ie resulterende ondergrawing van die effektiwiteit van strafbepalings sou egter so onaanvaarbaar wees dat dit die moontlikheid dat 'n nalatigheidstoets onder die dekmantel van 'n streng subjektiewe opsetstoets toegepas word, kan laat ontstaan. ...Sou dit dan nie beter wees om die kind by die naam te noem en te erken dat hierdie aspek van 'n beskuldigde se strafregtelike aanspreeklikheid aan die hand van objektiewe maatstawwe beoordeel moet word nie? Dit is interessant om daarop te let dat die Duitse strafreg alreeds hierdie gevolgtrekking bereik het."[22]

Whiting, although not an explicit proponent of the normative approach, takes the view that only a reasonable mistake of law should exculpate. He substantiates his view by adverting to the fact that many offences can only be committed intentionally. Were an accused therefore to escape liability on account of an

unreasonable mistake of law s/he could not be held liable for acting negligently. He therefore concludes that the approach adopted in *De Blom* "...will operate entirely to remove from the field of criminality conduct which it is suggested ought still to be regarded as criminal."[23]

Per contrast, jurists such as De Wet and Swanepoel, Visser and Vorster, Van Rooyen and Rabie commend the decision in *De Blom*. Although Visser and Vorster concede that "(i)n view of the difficulty in disproving allegations of mistake of law ...the principles expounded in *De Blom* do unduly favour the wrongdoer," and that "the only options available in this regard are a shifting of the *onus* to the accused or accepting that intention is excluded only if the mistake of law is unavoidable," they take the view that "...a shifting of the *onus* is preferable from a theoretical perspective."[24]

Rabie argues that "(t)he terms ignorance or mistake of law (and of fact are) ...misleading ...because (they) ...seek to focus on the nature of the ignorance or mistake, rather than on its effect." He thus advocates the abolition of the distinction between mistake of fact and mistake of law and urges that it be replaced with the German distinction between *Tätbestandsirrtum* and *Verbotsirrtum*. He retains his allegiance to the psychological theory, however, by taking the view that both *Tätbestandsirrtumer* and *Verbotsirrtumer* should operate to negate intent.[25]

It is interesting to note that "...the Supreme Court of Zimbabwe declined to follow the *De Blom* case in *S v Appleton 1982 (4) SA*

*829 (ZS)* at 831A where Fieldsend CJ expressed the view that the South African Appellate Division had given insufficient consideration to the far-reaching effects of its decision."[26] The High Court of Namibia has, however, accepted the present South African approach. In *S v Maseka 1991 (2) SACR 509 (Nm)* O'Linn J, albeit critical of certain aspects of the *De Blom* decision, nevertheless held that it reflects the current position in Namibian law. The relevant excerpt from the judgment reads as follows:

> "It seems to me that the most telling point of criticism is that in most cases where *mens rea* in the form of *dolus* is required and the *onus* is on the State, it may in many cases be virtually impossible for the State to discharge the *onus* beyond all reasonable doubt that the accused knew what the law required of him (*sic*). It may be that the Namibian Courts will in future reconsider the issue. However, it seems to me that *S v De Blom* at present correctly sets out Namibian law."(512a-b)

It is submitted that the foregoing survey highlights the fact that there is widespread academic support for the implementation of the normative theory in South Africa, as well as considerable concern about the far-reaching consequences of the *De Blom* decision. Furthermore, as is evident from the above-quoted *dicta*, the attitude of the judiciary in neighbouring jurisdictions to the *De Blom* decision is either one of outright rejection or of cautious acceptance.

## D. GERMAN LAW

### 1. KNOWLEDGE OF UNLAWFULNESS

It is apposite to commence the discussion of the German law of mistake by engaging in a brief analysis of the nature and content of the German concept of *Unrechtsbewusstsein* (knowledge of unlawfulness). As was mentioned *supra*, the concept forms part, not of intent, but of the element of culpability. The components of the latter are described as follows by Snyman:

> "...Eerstens word die toerekeningsvatbaarheidsvereiste beskou as deel van die skuldvereiste. ...Tweedens vorm wederregteliksbewussyn, wat kennis van sowel die verbodsbeskrywing as van die afwesigheid van regverdigingsgronde insluit, deel van skuld en wel by misdade wat opsetlik gepleegde handelings bestraf. ...Derdens vorm die besluit van die dader om die handeling te verrig (handelingswil of kleurlose opset) deel van skuld...Dit is 'n kenmerk van die moderne skuldbegrip dat opset 'n dubbele rol speel in die misdaadkonstruksie deurdat dit deel vorm van sowel onreg (en meer bepaald die verbodsbeskrywing) as van skuld. ...Ten slotte word vir skuld die afwesigheid van versontskuldigingsgronde ('das Fehlen von Entschuldigungsgrunden') vereis. ...(D)ie uitdrukking 'afwesigheid van verontskuldigingsgronde' (is) maar net 'n ander ...manier...waarop uitdrukking gegee word aan die gedagte dat die dader slegs vir sy (*sic*) wederregtelike gedrag verwyt kan word indien 'n mens in

> die omstandighede redelikerwys van hom (*sic*) kon *verwag* het om regmatig op te tree ('Zumutbarkeit')."[27]

The concept of knowledge of unlawfulness thus constitutes an element of culpability that is distinct from the *Zumutbarkeitsdoktrin* (the doctrine of reasonable expectability). It is therefore theoretically unsound to regard instances of exculpatory mistake of law as excuses in the German sense of the term, as so many commentators on German law seem to do. Per contrast, a definite distinction exists in German law between *Schuldausschliessungsgrunde* (grounds excluding culpability) and *Entschuldigungsgrunde* (grounds of excuse). Jescheck explains the former as follows: "Schuldfähigkeit und Bewusstsein der Rechtswidrigkeit sind *schuldbegrundende merkmale*. Ist der Täter nicht schuldfähig oder handelt er in unvermeidbarem Verbotsirrtum, so fehlt es an der Schuld."[28] The legal effect of an error of law is assessed in accordance with the *Unvermeidbarkeitsdoktrin* rather than the *Zumutbarkeitsdoktrin*. Whereas the former is governed by the criterion of unavoidability, the latter encompasses the standard of reasonable expectability. As will become apparent in what follows, the former standard embodies a more stringent test than the latter. In effect, the issue of whether or not a mistake of law exculpates is dealt with solely by reference to the element of knowledge of unlawfulness while the fourth component of culpability does not come into play. (This issue will be discussed more comprehensively in section D.4. *infra*.)

The content of the German concept of knowledge of unlawfulness differs somewhat from its South African counterpart. Botha provides a cogent exposition of the former: "Kennis van alleen die onsedelikheid of immoraliteit van die daad is nie voldoende nie. Maar aangesien die meeste van die norme van die Strafgesetzbuch ook sedelik afkeurenswaardig is, is daar noodwendig 'n groot mate van oorvleueling. Nie kennis van wederregtelikheid in regstegniese sin word verlang nie, maar wel kennis in leke sin, ...dit wil sê, 'n nie-juridiese waardebepaling deur die leek (nie-juris) in sy (*sic*) sfeer van sosiale denke en optrede." He states further that "(w)aar dieselfde handeling meer as een na-verwante misdryf kan uitmaak, moet die wederregtelikheidsbewussyn van die dader die besondere misdryf wat hom (*sic*) ten laste gelê word, omvat."[29] Arzt utilizes the offence of incest to illustrate the latter characteristic: "A daughter-in-law has intercourse with her father-in-law knowing that she is committing adultery and that her actions are legally and morally wrong, but not knowing that the act is included in the definition of incest. The daughter-in-law's knowledge has been held to be insufficient knowledge of the specific wrong inherent in incest."[30]

Botha adverts to a further characteristic of the concept of knowledge of unlawfulness (which, incidentally, is shared by its South African counterpart). "Die dader hoef nie van die wederregtelikheid van sy (*sic*) voorgenome optrede oortuig te wees nie. Ook as hy (*sic*) meen dat dit moontlik wederregtelik kan wees, maar hy (*sic*) besluit om nogtans daarmee voort te gaan, handel hy (*sic*) met wederregtelikheidsbewussyn."[31]

It should be apparent from the foregoing analysis that the German concept of knowledge of unlawfulness functions as a foundation for the reproach inherent in the concept of culpability. It will be seen more clearly in what follows that the application of the *Unvermeidbarkeitsdoktrin* at this stage of the analysis may result in the imposition of criminal liability in instances where the actor does not have actual knowledge of unlawfulness since the lack of such knowledge is regarded as culpable in the circumstances of the case.

## 2. THE EINGESCHRÄNKTE SCHULDTEORIE

An adequate understanding of the difference between the *Schuldteorie* and its *eingeschränkte* counterpart necessitates a brief excursus on the incremental acceptance and modification of German legal theory by the courts.

The *Vorsätzteorie*, which had hitherto been espoused by the *Reichsgericht*, received its death-knell in 1952 in a decision by the *Bundesgerichtshof*. The facts were as follows: The accused, an attorney, had undertaken to appear on behalf of an accused without reaching a prior agreement about fees. After his first appearance he threatened to cease defending her unless she paid him 50 Deutschmark immediately. When she complied he forced her by means of a similar threat to sign an acknowledgment of debt for a further 400 Deutschmark.[32]

In the course of its consideration of the accused's defence of ignorance of the law, the court held that not all instances of *error iuris* ought to exculpate. Botha provides a cogent summary of the *ratio*:

> "Onkunde (gebrek aan kennis) is binne perke beheerbaar. Aangesien die mens oor 'n vrye, sedelike selfbestemming beskik, word dit ten alle tye van hom (*sic*) verwag dat hy (*sic*), as deelhebber aan die regsgemeenskap, hom (*sic*) regmatig moet gedra en onreg moet vermy. Vir die nakoming van hierdie plig is dit nie voldoende as hy (*sic*) net dit vermy wat hy (*sic*) duidelik kan sien verkeerd is nie;

> sy (*sic*) plig gaan verder. Hy (*sic*) moet seker maak dat alles wat hy (*sic*) beoog binne die perke van die wet is. Waar hy (*sic*) twyfel moet hy (*sic*) deur nadenke of deur die nodige inligting te bekom, homself (*sic*) tevrede stel. Hiervoor is nodig gewetensinspanning na 'n maatstaf voorgeskryf deur die omstandighede en die lewens-en beroepskring van die individu. As hy (*sic*) ten spyte van die vereiste gewetensinspanning nie die onregmatigheid van sy (*sic*) optrede kon insien nie, is sy (*sic*) dwaling onoorwinlik en sy (*sic*) daad vir hom (*sic*) nie vermybaar nie. In so 'n geval kan hy (*sic*) nie van skuld verwyt word nie. Waar hy (*sic*) wel met behoorlike gewetensinspanning die onregmatigheid van sy (*sic*) daad kon herken het, lei sy (*sic*) verbodsdwaling nie tot die uitsluiting van skuld nie. Na gelang van die mate waarin hy (*sic*) versuim het om deur die nodige gewetensinspanning die onregmatigheid van sy (*sic*) optrede te herken, kan die skuldverwyt verminder word."[33]

Having thus delineated the principles applicable to *Verbotsirrtumer*, the *Bundesgerichtshof* held that the accused could, with the exercise of due conscientiousness, have avoided the perpetration of the error. It thus convicted the accused and ruled that his sentence be mitigated in accordance with the provisions of s49(1) of the Code.

The entrenchment of the *strenge Schuldteorie*, as manifested in the above decision, was, however, short-lived. The emergence of a number of penumbral cases in the period immediately

following upon its reception highlighted the unpalatable results that could in certain circumstances ensue from its application. The so-called *Erlaubnistätbestandsirrtum* (which is discussed in detail in Section D.3(b)(iii) *infra*) constitutes the prime example of the undesirable consequences of the *strenge Schuldteorie*. Being a species of *Verbotsirrtum*, it would, in terms of this theory, be subject to the *Unvermeidbarkeitsdoktrin* and would thus only exculpate if unavoidable. However, since an *Erlaubnistät-bestandsirrtum* comprises a factual error which results in an error of law, it was felt that such an approach was unjust when viewed from the perspective of the accused. Arzt provides a cogent exposition of the intrinsic nature of this species of error and the judicial approach thereto: "Someone may mistakenly believe in the existence of a factual situation in which the law permits acts otherwise criminal - such as erroneously assuming the factual situation of an illegal attack - and injure or kill a person, allegedly in self-defense. Such a case involves a combination of intent to kill and *error iuris* based on mistake of fact. The *Bundesgerichtshof* did not follow the strict theory of guilt, but rather decided these cases according to the principles of the theory of intent."[34] The inquiry into the (un)avoidability of an *Erlaubnistätbestandsirrtum* was thus eschewed and the existence of such an error operated *ipso facto*, as in instances of *Tätbestandsirrtumer*, to exclude intent.

This curtailment of the *strenge Schuldteorie* became known as the *eingeschränkte Schuldteorie* and essentially constitutes an eschewal of the ideal of theoretical precision in the interests of justice in certain, strictly delineated circumstances. (Incidentally, the third species of error discussed in Section D.3(c) *infra* represents another example of the operation of the *eingeschränkte Schuldteorie*.)

## 3. CATEGORIES OF MISTAKE

The multifarious categories of mistake that have emerged in German law are premised upon an acceptance of the *eingeschränkte Schuldteorie* outlined *supra*. The analysis that follows will encompass an exposition of the definitions and legal consequences of each of these categories with reference to a number of practical examples.

### (a) TÄTBESTANDSIRRTUM

The concept of *Tätbestandsirrtum* (mistake concerning the definition of the proscription) is defined as follows by Jescheck: "Ein Tätbestandsirrtum liegt danach vor, wenn jemand 'bei Begehung der Tät einen Umstand nicht kennt, der zum gesetzlichen Tätbestand gehört'. Gemeint mit diesen 'Umstanden' zunächst alle objektiven Merkmale des gesetzlichen Tätbestands."[35] S16 of the Code provides that such an error excludes intent and thus negates criminal liability regardless of whether it is reasonable or unreasonable. A successful reliance on a *Tätbestandsirrtum* renders the conduct in question lawful and hence justified. An actor errs in relation to the *Tätbestand* where, for example, s/he shoots and kills a human being in the mistaken belief that s/he is shooting at a tree stump. Since the definition of murder requires an intent to kill a human being the actor lacks intent in respect of this element and hence is acquitted, regardless of whether his/her error was reasonable or unreasonable.

Not every error concerning the definition of the proscription is regarded as exculpatory in German law. A distinction is drawn between *Subsumptionsirrtum* (a legally irrelevant error) and *Tätbestandsirrtum*. Arzt explains the nature of the distinction as follows: "A lay concept which does not sufficiently parallel the legal definition leads to a (*Tätbestandsirrtum*), since the layperson misunderstood a definitional element of the crime. A lay concept which does sufficiently parallel the legal definition leads to an irrelevant mistake under the doctrine of *Subsumptionsirrtum*."[36]

The distinction between *Tätbestands-* and *Subsumptionsirrtum* may be illustrated by reference to the concept of *breaking*, which constitutes one of the elements of the offence of housebreaking with intent to commit a crime. Assume that X enters a building by pushing open a partially open door with the intent of stealing an object inside the building in the mistaken belief that the offence of housebreaking is only committed if one physically gains access to the premises by, for example, picking the lock of a locked door. His/her error in this instance would constitute a *Tätbestandsirrtum* since his/her concept of *breaking* does not sufficiently parallel the legal definition thereof. (S/he would of course be guilty of theft in such circumstances, but that is not in issue for the purposes of this discussion.) Per contrast, X's error would constitute a legally irrelevant *Subsumptionsirrtum* if s/he

thought that opening a closed but unlocked door constituted housebreaking but that opening a partially open door did not, since his/her concept of *breaking* does sufficiently parallel the legal definition thereof.

It is submitted that the above example illustrates the practical utility of the distinction. The classification of a particular offence as either housebreaking or theft is of extreme relevance to the accused since the former ordinarily justifies the imposition of a much heavier sentence than the latter. Furthermore, in the case of offences in general, the distinction may function to determine whether or not the accused is criminally liable.

**(b) VERBOTSIRRTUM**

Jescheck provides the following definition of the German concept of *Verbotsirrtum*: "Der Verbotsirrtum ist der Irrtum über die Rechtswidrigkeit der Tät. ...Der Täter weiss, was er (*sic*) tut, nimmt aber irrig an, es sei erlaubt. Verbotsirrtum ist aber nicht nür die positive Annahme, die Tät sei erlaubt, ...auch das *Fehlen einer Vorstellung* über die rechtliche Bewertung der Tät."[37] The ambit of the German concept of *Verbotsirrtum* is wider than the South African notion of *error iuris*. It encompasses both *error iuris* in the sense of ignorance or mistake of law (*direkter Verbotsirrtum*) and a mistaken belief in the existence or extent of a justification ground (*indirekter Verbotsirrtum*).

The *Unvermeidbarkeitsdoktrin*, which is determinative of the legal effect of a *Verbotsirrtum*, is entrenched in s17 of the Code. The section reads as follows: "Fehlt dem Täter das Unrechtsbewusstsein, so handelt er (*sic*) ohne Schuld, wenn die Unkenntnis für ihn unvermeidbar war (s 1). Könnte der Täter den Irrtum vermeiden, so kann die Strafe nach s49 I gemildert werden (s 2).[38] Whereas, as was mentioned *supra*, a *Tätbestandsirrtum* renders the conduct in question justified and hence lawful, an *Unvermeidbaren Verbotsirrtum* operates as a *Schuldausschliesungsgrund* and thus precludes the inquiry into culpability, although the conduct in question remains unlawful.

Not every mistaken belief pertaining to a justification ground is regarded as an instance of *indirekter Verbotsirrtum*. Jescheck provides a three-tier classification of the different kinds of error concerning a justification ground and the different legal consequences attaching to each:

(i) *Bestandsirrtum*: "Der Täter nimmt irrig das Bestehen eines von der Rechtsordnung nicht anerkannten Rechtfertigungsgrundes an..."

(ii) *Grenzirrtum*: "(Der Täter) verkennt die rechtlichen Grenzen eines anerkannten Rechtfertigungsgrundes..."

Both *Bestandsirrtum* (error concerning the existence of a justification ground) and *Grenzirrtum* (error concerning the extent of a justification ground) are regarded as instances of *indirekter Verbotsirrtum* and are thus subject to determination in accordance with the *Unvermeidbarkeitsdoktrin*. Fletcher provides the following examples of *Bestandsirrtum* and *Grenzirrtum*: The former occurs, for example, when the actor believes "that as a teacher, one is privileged to use corporal punishment as a disciplinary measure," whereas in fact no such justification ground exists in the jurisdiction. The latter occurs when, for example, the actor believes "that deadly force is permissible to stop a petty thief," whereas in fact only non-deadly force is permissible in such circumstances.[39]

(iii) *Erlaubnistätbestandsirrtum*: "Der dritte Fall, in dem der Täter irrig Umstande für gegeben halt, die, wenn sie vorlägen, die Tät rechtfertigen wurden, ...ist ein Irrtum eigener Art..."[40]

As was mentioned in Section D.2 *supra*, the *sui generis* nature of an *Erlaubnistätbestandsirrtum* derives from the fact that it straddles the categories of *Tätbestandsirrtumer* and *indirekter Verbotsirrtumer*. Although the new Code does not deal with this type of error, the consensus of opinion is that, like a *Tätbestandsirrtum*, it operates to exclude intent and hence renders the conduct in question justified. As was pointed out in Section D.2 *supra*, this kind of error constituted the *raison d'être* for the *eingeschränkte*

*Schuldteorie.* An actor labours under an *Erlaubnistätbestandsirrtum* where, for example, s/he kills another in the mistaken belief that s/he is being attacked by an aggressor. Had his/her mistaken belief been correct his/her conduct would have constituted self-defence and would thus have been justified. An *Erlaubnistätbestands-irrtum* is clearly founded upon a factual error that results in an error of law. Fletcher avers that "there is considerable authority supporting the same outcome as applied to mistakes about the definition."[41]

## (c) IRRTUM ÜBER ENTSCHULDIGUNGSGRUNDE

Errors concerning grounds of excuse, albeit subject to the same three-tier system of categorisation as those concerning grounds of justification, have different legal consequences. Jescheck provides the following exposition of the rationale for the differential treatment of the various categories: "Der Irrtum über das Bestehen eines Entschuldigungsgrundes ist ebenso bedeutunslos wie der Irrtum über seine Grenzen, da nür der Gesetzgeber darüber entscheiden kann, in welchen Fällen mit Rucksicht auf die wesentliche Minderung des Unrechts- und Schuldgehalts der Tät kein Schuldvorwurf erhoben wird."[42] "Der unvermeidbare Irrtum über die Voraussetzungen eines anerkannten Entschuldigungsgrundes entschuldigt der Täter, weil er (*sic*) subjektiv unter den gleichen Bedingungen handelt, wie wenn die dem

Entschuldigungsgrund entsprechende Lage wirklich gegeven gewesen ware."[43]

Fletcher provides the following examples of the first two types of error relating to an excuse: the actor believes "that the jurisdiction recognizes the excuse of necessity as well as of duress" whereas in fact necessity does not constitute an excuse in the relevant jurisdiction; the actor believes "that the excuse of duress encompasses homicide as well as lesser offenses" whereas the jurisdiction does not excuse homicide on the grounds of duress.[44] He attributes the legal irrelevance of these errors to the fact that, on the one hand, they "do not negate the actor's choice to commit a wrongful act," and that, on the other hand, "the range of excuses recognized in a particular system is a delicate political issue; if mistakes could expand the range of excusing conditions, the courts and legislatures would lose control over the scope of acceptable excuses."[45]

The third type of error occurs where, for example, the actor believes "that unless one commits perjury, one will be killed by the defendant in the case."[46] Had the belief been correct, the conduct in question would have been excused. Since "the subjective experience of pressure is just as great, whether the danger is real or imaginary," this type of error is not treated as irrelevant but is adjudicated in accordance with the *Unvermeidbarkeitsdoktrin*. "Thus the mistake must be unavoidable in order that the actor's conduct be assessed as though the threat and the danger

were real."[47] As was mentioned in Section D.2 *supra*, the legal consequence attaching to this type of error exemplifies the operation of the *eingeschränkte Schuldteorie*.

It is submitted that the intricate categorisation system employed in relation to the German law of mistake exemplifies both the theoretical precision and the practical utility of the normative theory of criminal liability. Furthermore, and most importantly, the development of intermediate categories such as *Erlaubnistätbestandsirrtum*, and the utilisation of the flexible criterion of *Unvermeidbarkeit* (albeit suitably modified as will be argued in Section D.4 *infra*) in the adjudication of *Verbotsirrtumer*, facilitates the unenviable task of the solution of penumbral cases.

## 4. UNVERMEIDBARKEITSDOKTRIN: A CRITIQUE

To reiterate an oft-mentioned point, *Verbotsirrtumer* are assessed in accordance with the *Unvermeidbarkeitsdoktrin*. A *Verbotsirrtum* exculpates if unavoidable, but merely results in mitigation of sentence if avoidable. The test for *Verbotsirrtumer* is thus more stringent than that for *Tätbestandsirrtumer* (which exclude intent and hence exculpate regardless of their (un)avoidability). The difference in effect between the two types of error is justified by reference to the following rationale: An actor who has knowledge of the contents of the proscription is put on his/her guard and is expected to check carefully that his/her proposed behaviour is not contrary to law (the so-called *Warnfunktion des Tätbestandsvorsätzes* referred to *supra*.) "From this, it follows that the law should set higher standards for excusing a defendant acting without consciousness of wrongdoing than a defendant acting without knowledge of the factual situation."[48]

Although the duality of this approach has been criticised, it is submitted that there are good grounds for its existence. Not only is the above-mentioned rationale well-founded, it is also important for a legal system to achieve a fair balance between the needs of the individual and those of the social collectivity. One of the fundamental touchstones of modern social democracy is the rule of law. To freely allow individual misperceptions to supercede the dictates of the law (as is the case, it is submitted, in South African law) could result in the eschewal of the rule of law and hence undermine the needs of

the social collectivity. (This point will receive further elaboration in Section E.3(b) *infra*.)

Upon closer examination, however, the stringency of the *Unvermeidbarkeitsdoktrin* becomes apparent. Not only is it more stringent than the test for *Tätbestandsirrtumer*, it is also more stringent than both the test for negligence and the test for a well-founded excuse. The normative test for negligence is described as follows by Jescheck: "The unlawfulness of negligence consists of violating the duty of due care demanded in human relations, and in thus causing an unlawful result, for example, the death of a person by negligent homicide. The *mens rea* of negligence, however, lies in the offender not adhering to the required standard of care and foresight, although he (*sic*) could to the extent of his (*sic*) personal capacity well have done so. Thus an objective 'reasonable-man'(*sic*)-test as well as a subjective 'personal capacity'-test is applied in ascertaining negligence in German criminal law."[49] It has been argued that the test for *Verbotsirrtumer* should differ from the test for negligence since "...the blame in *error iuris* is of a different kind. Negligence is culpable failure to use care necessary to avoid harm; failure to do so is largely a matter of intellect and manual skill. The central concept of vincible error, on the other hand, is failure to search one's conscience."[50]

Arzt is critical of this approach. Although he concedes that "(t)he desire to erect simple and efficient floodgates against mistake of law defenses may dictate this result,"[51] he is of the view that the difference in standard between the test for *Verbotsirrtumer*

and for ordinary negligence is unacceptable. Botha is likewise critical of the German approach. He argues that "(d)it is egter moeilik om in te sien hoe die toets vir die bepaling van 'n verwytbare verbodsdwaling iets anders as 'n sorgvuldigheidsmaatstaf is, soortgelyk aan dié waarmee die teenwoordigheid van *culpa* gebruiklikerwyse vasgestel word..."[52]

As was mentioned *supra*, German law distinguishes between a *schuldauschliesungsgrund*, a ground excluding culpability, and an *entschuldigungsgrund*, a ground of excuse. An unavoidable *Verbotsirrtum* is regarded as a species of the former. While *Verbotsirrtumer* are governed by the *Unvermeitbarkeitsdoktrin*, grounds of excuse are governed by the *Unzumutbarkeitsdoktrin* (the doctrine of reasonable expectability). Since the *Unzumutbarkeitsdoktrin* embodies a test which is both objective and subjective and is predicated upon the notion of reasonableness, it is in effect the same as the test for negligence. It follows from what was stated *supra* that the test for an unavoidable mistake of law is higher than the test for a well-founded excuse. That the *Unzumutbarkeitsdoktrin* is not applicable to instances of mistake of law is borne out by the following remark by Snyman: "Die algemene gevoel onder die meeste skrywers is dat die leerstuk (van *Unzumutbarkeit*) te vaag en algemeen is om as 'n algemene verweer in die regspraktyk te dien. ...(dit) sal lei tot regsonsekerheid en (sal) ...die algemeen afskrikkende doel van strafoplegging aan bande ... lê."[53] "Dit leef voort in die besondere skulduitsluitingsgronde wat in die Duitse positiewe reg erken word, soos skulduitsluitende noodtoestand, die oorskryding van noodweer, sekere gevalle

van handeling op bevel en die reëls met betrekking tot wat van iemand verwag word in 'n situasie waarin hy (*sic*) moet kies tussen twee botsende pligte."[54]

That the test for *Verbotsirrtumer* embodies a standard that is higher than both the test for negligence and the test for a ground of excuse should be abundantly clear from the above analysis. It is submitted that the difference in standard between the tests is not dictated by considerations of theoretical logic or precision. Per contrast, it constitutes an illustration of the inflection of the law with a conservative value-judgment. It is submitted further that, although this approach may have coincided with socio-political reality at an earlier historical moment, it has, in the face of the merging of East and West and the concomitant heterogenisation of the German community, ceased to do so. A stratified community that espouses conflicting social and moral values cannot with integrity uphold an overly stringent approach to mistake of law.

It is accordingly submitted that the German doctrine of mistake can only successfully be implemented in South Africa provided it is shorn of its intractable approach to mistake of law. The test for a successful reliance on mistake of law should encompass a criterion that is no higher than that embodied in the *Unzumutbarkeitsdoktrin* or in the ordinary test for negligence.

## E. ENGLISH LAW

### 1. THE ENGLISH RULE

As was mentioned *supra*, English law adheres in principle to the psychological rather than the normative theory of criminal liability. Although a strict application of this theory leads to the equal treatment of mistakes of fact and of law, English jurists have eschewed theoretical precision in favour of legal policy in relation to mistake of law by adopting the maxim *ignorantia iuris non excusat*. English law thus adheres to the psychological theory only in relation to mistake of fact.

The law relating to mistake of fact was clarified as follows in *Director of Public Prosecutions v Morgan (1976) AC 182, (1975) 2 All ER 347*:

> "Mistake is a defence where it prevents D from having the *mens rea* which the law requires for the crime with which he (*sic*) is charged. Where the law requires intention or recklessness with respect to some element in the *actus reus*, a mistake, whether reasonable or not, which precludes both states of mind will excuse. Where the law requires only negligence, then only a *reasonable* mistake can afford a defence...Where strict liability is imposed, then even a reasonable mistake will not excuse."[55]

English and South African law thus adopt the same approach to mistake of fact. There are, however, some indications in the

recent case-law that the English courts require a mistake of fact to be reasonable before it can exculpate. "In doing this, the courts appear to be resiling from the position adopted by the House of Lords in *Morgan* where it was held that any mistake defeating the required mental element must exculpate as a matter of logical necessity, whether it was a reasonable one or not."[56]

The English rule relating to mistake of law was firmly reiterated by Lord Bridge in *Grant v Borg (1982) 2 All ER 257 (HL)* at 263: "...the principle that ignorance of the law is no defence in crime is so fundamental that to construe the word 'knowingly' in a criminal statute as requiring not merely knowledge of facts material to the offender's guilt, but also knowledge of the relevant law, would be revolutionary and, to my mind, wholly unacceptable."[57] The *ignorantia iuris non excusat* maxim holds "even though it also appears that D's ignorance of the law was quite reasonable and even, apparently, if it was quite impossible for him (*sic*) to know of the prohibition in question. ...In *Bailey*, D was convicted of an offence created by a statute which was passed while he was on the high seas although he committed the act before the end of the voyage when he could not possibly have known of the statute." The judges did, however, recommend a pardon.[58] The logical converse of the *ignorantia iuris* rule is that knowledge of unlawfulness is not regarded as an essential element of criminal liability in English law.

## 2. IGNORANTIA IURIS: EXCEPTIONS

The inflexibility of the *ignorantia iuris* rule has engendered the development, in typically casuistic fashion, of a number of exceptions thereto. As has been argued by Smith, "...the English courts have shown themselves ready in appropriate situations to manipulate the law and fact distinction, sometimes in such a way as to exculpate persons genuinely not at fault in breaking the law."[59] The exceptions developed by the courts and the legislature will briefly be outlined in what follows:

(a) The legislature has, in section 3(2) of the Statutory Instruments Act of 1946, attempted to alleviate the burden of the ignorant accused. The section reads as follows: "In any proceedings against any person for an offence consisting of a contravention of any ...statutory instrument, it shall be a defence to prove that the instrument had not been issued by Her Majesty's Stationary Office at the date of the alleged contravention unless it is proved that at that date reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged." Smith has noted that the ambit of the section is restricted to situations where the instrument has in fact not been published, and takes the view that "...the section has about it more the air of an improvised post-war emergency measure than a calculated attempt to eradicate potential injustices."[60]

(b) The courts have come to the aid of the ignorant accused in certain instances where the law is genuinely unknowable. "In LIM CHIN AIK the Judicial Committee of the Privy Council held that an immigrant could not be guilty of a breach of an immigration ordinance made in respect of him personally where he was unaware of its existence, and no steps had been taken to acquaint him of its promulgation."[61]

(c) Knowledge of unlawfulness is regarded as an element of criminal liability in the case of children between the ages of 8 and 14 and must be proved by the Crown.[62]

(d) Where the Legislature criminalises continuing conduct which has hitherto been legal, the accused must be given a reasonable opportunity to cease such conduct or to put it right.[63]

(e) "Subsumpsiedwaling (die dader is vertroud met die wetsbepaling maar meen verkeerdelilk dat sy (*sic*) handeling nie daardeur gedek word nie) word beskou as 'n 'mistake of mixed law and fact' en verskoon oor die algemeen."[64]

(f) It was held in *Barrett and Barrett (1980) 72 Cr App Rep 212 (CA)* at 216 that "...an honest belief in a certain state of things does afford a defence, including an honest though mistaken belief about legal rights."[65] As has been

mentioned by Smith and Hogan, however, the principle enunciated in *Barrett* only applies where the definition of the *actus reus* contains a legal concept such as 'property belonging to another', and is "probably also confined to the case where the legal concept belongs to the civil law..."[66]

(g) The *ignorantia iuris* maxim does not apply in the case of a so-called 'claim of right'. Smith and Hogan explain the operation of this exception as follows: "...if D believed he (*sic*) had a right to do the act in question, he (*sic*) had no *mens rea* and therefore was not guilty of the crime. This defence will prevail even if D's belief is mistaken and is based upon an entirely wrong view of the law. It is available in a number of important crimes, including theft (and) criminal damage to property..."[67]

(h) Certain criminal statutes have curtailed the operation of the *ignorantia iuris* maxim. The definition of blackmail in the Theft Act constitutes an example of this legislative trend. "The offence is only committed if the 'demand' is 'unwarranted', and it is not unwarranted if D believes that 'the use of menaces is a proper means of reinforcing the demand.'"[68]

(i) Since foreign law is regarded as fact by the English courts, mistakes of foreign law are treated as mistakes of fact and are thus excusable.[69]

It should be apparent from the foregoing that the multifarious exceptions to the *ignorantia iuris* rule have severely circumscribed its sphere of operation. In the light of the many criticisms of the rule (on which see section E.3. *infra*) and of its restricted field of application, it would clearly have been apposite for the English Law Commission to advocate its abolition. The Commission refused to do so, however, since there is no authority in English law in favour of a defence of mistake of law. It therefore chose to adhere to the orthodox position.[70]

## 3. IGNORANTIA IURIS: A CRITIQUE

As was argued in Section D.4 *supra*, it is necessary, in order to uphold the value of social responsibility and to prevent the eschewal of the rule of law, to treat *Verbotsirrtumer* more stringently than *Tätbestandsirrtumer*. It was argued further, however, that the criterion employed to distinguish between exculpatory and non-exculpatory *Verbotsirrtumer* should ensure that these values are balanced against the value of individual liberty. The maintenance of such a balance will, it is submitted, facilitate the achievement of *social justice*. It will be argued in what follows that this balance can be achieved by the utilisation of the flexible criterion of reasonableness rather than by the deployment of the maxim *ignorantia iuris non excusat*. The rigidity of the maxim has engendered numerous exceptions and has thereby caused the law to be unnecessarily complex and uncertain. Moreover, the arguments that purport to justify the retention of the maxim tend, it is submitted, to weight the scales unduly against the value of individual liberty. The two major philosophical rationales that favour the existence of the maxim, viz the argument from utilitarianism and the argument from legality, constitute the primary focus of the following analysis.

### (a) The argument from utilitarianism

Oliver Wendall Holmes, the most renowned exponent of the utilitarian philosophy, formulates his argument in the following terms: "Public policy sacrifices the individual to

the general good...It is no doubt true that there are many cases in which the criminal could not have known that he (*sic*) was breaking the law, but to admit the excuse at all would be to encourage ignorance...and justice to the individual is rightly outweighed by the larger interests on the other side of the scales."[71] The utilitarian argument, albeit rightly concerned to emphasise the importance of the interests of the social collectivity, accords insufficient weight to the interests of the individual and hence fails to achieve the balance that, it has been submitted, is necessary to ensure the attainment of *social justice*.

**(b) <u>The argument from legality</u>**

Hall has argued that "if the law were to assess a defendant's culpability on the footing of the law as he (*sic*) believed it to be, then for those purposes the law would be thus and so. This could undercut the rule of law, which relies on an objective law impartially administered by officials who declare what the law is." Fletcher has attempted to refute this argument by averring that it fails "to distinguish between wrongdoing and attribution, justification and excuse. The mere fact that an individual is not held to be legally accountable for a wrong act does not mean that the act is not condemned; it means only that the actor is not to be blamed for what he (*sic*) did. Excusing a particular violation does not alter the legal prohibition. Recognizing mistake of law as an excuse does not change the law; if the excused mistaken party were

> to leave the courthouse and commit the violation again, he (*sic*) would clearly be guilty."[72]

> Smith takes issue with Fletcher's refutation of Hall's argument. He acknowledges the theoretical plausibility of Fletcher's statement that an excuse does not modify the law but argues that in practice the effect of such an excuse is indeed to change the relevant legal rule, since, in the absence of a profound and widely-publicised alteration of the legal *status quo*, the average lay-person is unlikely to appreciate the difference between grounds of justification and grounds of excuse.[73]

> It is submitted that Hall's concern to uphold the rule of law is justified since its retention is necessary to avoid the creation of social anarchy. It is submitted further, however, that to overemphasise the omnipotence of the rule of law is to lapse into an authoritarian argument that undermines the importance of individual liberty and hence fails to achieve the balance between competing interests that the ideal of *social justice* demands.

It should be apparent from the foregoing that the two major arguments that purport to favour the *ignorantia iuris* maxim fail to achieve the ideal of *social justice* in the realm of the philosophical abstraction. It must be conceded, however, that the cumulative effect of the rule and its exceptions is to achieve *social justice* in most practical instances, albeit only in relation to the adjudication of core cases. This assertion may be illustrated

by reference to the English defence of a 'claim of right'. (This defence was discussed in Section E.2(g) *supra*.) Assume that X sells Y's property in the mistaken belief that s/he had a right to do so since Y had sold it to him/her. In fact, and unbeknown to X, the property is still owned by Y in terms of a reservation of ownership clause in a hire-purchase agreement. In terms of English law X can successfully raise the defence of a 'claim of right' if charged with the offence of theft. It is submitted that an application of the German approach to the above factual scenario would yield the same result. X's error would be classified as a *Tätbestandsirrtum* since s/he has misconstrued one of the elements of the *Tätbestand* viz the intention to appropriate the property of another. The *effect* of the English approach to the solution of core cases is thus largely the same as the German.

It is submitted, however, that the adjudication of penumbral cases is rendered problematic by the rigidity of the English approach. The steadfast refusal on the part of the English courts to exculpate in instances of reasonable reliance on erroneous legal advice and in cases of mistakes pertaining to grounds of justification exemplifies the above assertion. It will appear from a consideration of the discussion in Section G *infra* that the German approach is adequately equipped to deal with such issues.

It has been argued that the English approach, albeit insufficiently equipped to ensure the attainment of *social justice* in the realm of philosophy, is nonetheless capable of realising this ideal in practice, at least in the solution of core cases. It thus *effectively*

approximates the German approach in this regard. It remains, however, to consider which of the two jurisdictions employs the most advantageous *method* of achieving this result.

## F. METHODOLOGY: GERMAN V ENGLISH LAW

It may be said that the German and the English legal systems are premised upon paradigmatic opposites. The difference in method between the two jurisdictions is aptly summarised by Snyman: "...Germans tend to reason deductively, whereas the English are traditionally sceptical of reasoning from the general to the particular and prefer the more inductive method of reaching a conclusion by reasoning by analogy...The English prefer...to confine the result of an inquiry to the particular context, in other words, facts, of a case."[74] Whereas German jurists are concerned with theoretical precision and logical deduction, English lawyers often become ensconced in a plethora of casuistic extensions, exceptions and variations. Matthews adverts to the disadvantages of the English method in relation to *error iuris*. He argues that "(a) particularly difficult problem of moral blameworthiness arises in any case where the law is uncertain. How can D be morally liable for an act if even the lawyers and judges do not know *at that stage* if such an act is legally right or wrong?" He proceeds to illustrate "...some of the dangers of convicting the morally innocent. First, it invites contempt for the law, as being unrealistic and out of touch. Second, as a result of the first, it must lessen the status of 'convict' for more serious crimes. Third, ...a defendant is tarred with a conviction which may affect his (*sic*) present status in the community, or his (*sic*) future prospects..."[75]

It is submitted, along with Snyman, that "...the German approach is preferable. Because of consistency of principle it is more conducive to legal certainty than the English model. The law becomes more predictable since one is dealing with a system of general rules or

concepts capable of systematic analysis..."[76] Furthermore, the theoretical precision of the German approach, as exemplified in the development of categories of mistake that facilitate the solution of both core and penumbral cases (*vide* Section D.3 *supra*), is conducive to legal simplicity and hence enhances the accessibility of the law (an important consideration in a heterogeneous and underdeveloped society such as South Africa). Moreover, the flexibility of the criterion employed to distinguish between exculpatory and non-exculpatory *Verbotsirrtumer* (suitably modified to approximate the standard of reasonableness, as was argued *supra*) ensures that the conflicting values which inevitably exist in a heterogeneous society are recognised and given effect to in appropriate cases. As has been argued by Fletcher, "(t)he tight moral consensus that once supported the criminal law has obviously disappeared. This has happened as a result both of the vast expansion of the criminal law into regulatory offenses and the disintegration of the Judeo-Christian moral consensus. In a pluralistic society, saddled with criminal sanctions affecting every area of life, one cannot expect that everyone know what is criminal and what is not."[77]

## G. ADVANTAGES OF GERMAN LAW

It was argued in the preceding section that, although the German and English law of mistake ordinarily yield the same result in the adjudication of core cases, the methodology utilised by the former is preferable to the casuistic approach of the latter. It has, furthermore, been asserted throughout this paper that the normative approach, as applied in German law, is theoretically superior to the psychological approach adhered to in South African law, and that its implementation in practice may in certain circumstances affect the outcome of the decision. This latter submission will be substantiated in what follows with reference to the German approach to errors concerning grounds of justification and to the problem of reliance on erroneous legal advice.

## 1. MISTAKEN BELIEF CONCERNING JUSTIFICATION GROUND

The legal effect of an error relating to a ground of justification in the *post-de Blom* era is expounded as follows by De Wet and Swanepoel: "...die persoon wat ten onregte meen dat sy (*sic*) handeling geregverdig is of wat die perke wat regtens geoorloof is oorskry, (handel) wel wederregtelik..., maar ...nie *dolo malo* ...nie, omdat wederregtelikheidsbewussyn ontbreek. Dit geld ook van die persoon wat te goeie trou die perke van 'n regverdigingsgrond oorskry. Aan die ander kant handel 'n persoon wel opsetlik as hy (*sic*) weet dat hy (*sic*) die perke van 'n regverdigingsgrond oorskry, en is hy (*sic*) aanspreeklik vir sy (*sic*) *dolus*, alhoewel hy (*sic*) miskien tegemoetkomend gestraf kan word, omdat hy (*sic*) in die opwinding van die oomblik gehandel het."[78] In South African law, therefore, an error concerning a ground of justification, if *bona fide*, negates intent and hence excludes criminal liability regardless of its (un)reasonableness. It may, however, result in the imposition of liability in the case of crimes requiring negligence if it is unreasonable. The German distinction between *Bestands-* and *Grenzirrtumer*, on the one hand, which exclude *Schuld* only if unavoidable, and *Erlaubnistätbestandsirrtumer*, on the other, which exclude intent regardless of their (un)reasonableness, is not made in South African law. This unduly liberal approach has resulted in a number of problematic judgments.

In *S v Barnard (1) 1985 (4) SA 431 (W)* the accused, two policemen, were charged with the murder of two alleged

housebreakers. They sought to rely on the statutory justification ground of justifiable homicide which is incorporated in s49(2) of the Criminal Procedure Act 51 of 1977. The court, per Coetzee J, held that the accused had failed to comply with the requirements of the subsection since the flight of the deceased could have been prevented by other means. The issue before the court was thus whether the accused had *bona fide* believed that their conduct fell within the subsection, ie whether or not they had acted with knowledge of unlawfulness.

"Both assessors were satisfied that the accused had been aware of the wrongfulness of their actions. Coetzee J, on the other hand, felt that it could reasonably possibly be true that the accused had committed a gross error of judgment and, therefore, lacked knowledge of wrongfulness."[79] The consequence of such a finding in terms of the psychological approach, viz an acquittal, was clearly at odds with the learned judge's sense of justice. He therefore attempted to apply the normative approach in the guise of the psychological approach in order to secure a conviction.

Since the *ratio* constitutes anything but a logical exposition of the law, it is worth quoting *in toto*. The learned judge reasoned as follows:

> "Ek meen dis juridies onsuiwer om wederregtelikheidsbewussyn in 'n geval wat onder art 49 ressorteer te beperk tot bloot simplistiese daadwerklike kennis van die verbode aard van die daad. Dit is 'n

unieke geval. Die dader moet self daar en dan objektief die redelikheid van sy (*sic*) optrede beoordeel, wat *ex post facto* op dieselfde objektiewe basis gekontroleer staan te word. Daarvan hang die wederregtelikheid van die daad af. As hierdie objektiewe element noodwendig moet bestaan op die oomblik wanneer die daad gepleeg word, wat ook die oomblik is wanneer sy (*sic*) bewussyn van die aard daarvan relevant is, skyn dit vir my hoegenaamd nie onlogies dat daardie selfde element nie buite rekening gelaat kan word wanneer die inhoud van die begrip, wederregtelikheidsbewussyn, in hierdie bepaalde geval betrag word nie. Dit beteken dan nie net daadwerklike kennis, subjektief gesproke, nie. Dit kan ook so gestel word. Die dader wat besluit om opsetlik te dood weet dat dit wederregtelik is, *tensy* hy (*sic*), objektief gesproke, tevrede is dat daar nie 'n ander redelike uitweg is nie. As hierdie objektiewe basis nie bestaan nie, dan bly die aanvanklike bewussyn van die wederregtelikheid voortbestaan as die vereiste element, selfs in die psigologiese skuldbegrip.

Moontlik sal hierdie resultaat deur sommige beskou word as 'n geringe inenting van die normatiewe begrip in hierdie bepaalde geval, vir regspolities rede, op die aanvaarde psigologiese skuldbegrip. Ek glo egter nie dat dit prakties enige saak maak nie. Ek meen dat dit nodig is om wat andersins 'n onbevredigende juridiese prent is, helderder in te kleur.

Myns insiens dus *in casu*, maak dit nie saak of, soos deur die assessore bevind is, daar die daadwerklike

> wederregtelikheidsbewussyn ...aanwesig was of nie. Daar was nogtans...wederregtelikheidsbewussyn in juridiese sin, as die beskuldigde objektief die situasie verkeerd beoordeel het."(438C-H)

In *S v Nel 1980 (4) SA 28 (ELD)* the appellants, also two policemen, were charged with attempted murder in that they had shot at two persons who had failed to stop at a road block. Counsel for the appellants contended that "...by travelling though the so-called 'road block' in the way they did the complainants committed an offence in the presence of the appellants and that the appellants were therefore entitled to arrest them," in accordance with the provisions of s40 (1) (a) of the Criminal Procedure Act 51 of 1977.(33D-E) The court, per Eksteen J, rejected this contention since the road block had not been a proper road block. The alternative contention, which was founded upon s40 (1) (b), was also rejected by the court since the requisite 'reasonable suspicion' was lacking. The appellants sought further to rely on the statutory justification ground embodied in s49 and argued that they had *bona fide* believed that their conduct fell within the provisions of the section. "On the facts the appeal court found the belief so unreasonable, 'more particularly when applied to trained policemen', that the court could not believe it to have been held in good faith."[80]

Snyman has argued that an analysis of the case causes one to wonder whether the courts, "in gevalle waar die aanwending van 'n suiwere subjektiewe toets by 'n verweer van regsonkunde tot onbillike resultate sou lei, nie tog maar terugval op 'n objektiewe

redelikheidstoets nie – al sê hulle dit nie uitdruklik nie. Die indruk wat 'n mens uit die *Nel*-beslissing kry, is dat die hof 'n bevinding van wederregtelikheidsbewussyn gemaak het eenvoudig op grond van die *onredelikheid* van die beskuldigde se dwaling."[81]

It is submitted that an application of the German three-tier classification of errors relating to justification grounds yields the conclusion that the errors in both *Barnard* and *Nel* constitute *Grenzirrtumer*. In *Barnard* the accused had exceeded the bounds of the statutory justification ground of justifiable homicide by shooting without first resorting to other methods of preventing the accused from fleeing. They had, however, acted in the belief that they had complied with all the requirements of the section. In *Nel*, per contrast, the appellants had exceeded the bounds of justifiable homicide since they had acted without entertaining a reasonable suspicion that the complainants had committed a Schedule 1 offence. They alleged, however, that they had erroneously but honestly believed that they had complied with the requirements of the section. (It is interesting to note that, had the appellants' evidence that they had believed the road block to be a proper road block been accepted by the court, their error would have been classified as an *Erlaubnistatbestandsirrtum* by a German court and would thus have negated intent.)

The submission that the above errors constitute a species of *Grenzirrtum* is supported, *inter alia*, by Van der Merwe.[82] In terms of German law, therefore, the issue of their (non)exculpatory effect would have been determined in

accordance with the *Unvermeidbarkeitsdoktrin*. It is submitted that a German court would have found that in both instances the errors were avoidable and hence would only operate in mitigation of sentence. An application of the normative approach would thus yield the same result as was reached in *Barnard* and *Nel*. It would enable our courts to decide penumbral cases in accordance with their sense of justice without having to manipulate existing legal principles (as in *Barnard*) or to resort to the law of evidence (as in *Nel*). It is in this way that the *Unvermeidbarkeitsdoktrin*, suitably modified to approximate the criterion of reasonableness, can be utilised to impose criminal liability in instances of abuse of power on the part of state officials, such as the police, who are statutorily imbued with wide discretionary freedom.

## 2. THE PROBLEM OF LEGAL ADVICE

Since the decision in *De Blom* it has become settled law that reliance on erroneous legal advice negates knowledge of unlawfulness in crimes requiring intention regardless of the (un)reasonableness of such reliance. In relation to crimes requiring negligence, however, it was held in *De Blom* "that a person who works in a particular sphere of activity ought to know the law relating to that activity."[83] Reliance on erroneous legal advice in the case of negligence crimes is therefore subject to the criterion of reasonableness.

The nature of the conduct in respect of which legal advice may be followed was outlined as follows in *S v Barketts Transport (Pty) Ltd 1986 (1) SA 706 (C)*: The legal advice "should relate to a single transaction or act about to be entered into or about to be carried out and not to a course of conduct extending over a considerable time in the future." The dynamism of the law, the court held, necessitates such a delineation of the conduct in question since "legal advice obtained today as to a particular state of affairs may tomorrow no longer be pertinent."(712H-713A)

In *S v Waglines (Pty) Ltd 1986 (4) SA 1135 (N)* the standard of reasonableness in relation to crimes requiring negligence was considered and clarified. The court, per Didcott J., argued as follows:

> "The reasonable man (*sic*), your man (*sic*) of average intelligence and sophistication, the one whose fair share of worldly experience has taught him (*sic*) a thing or two, knows after all that questions of law lend themselves frequently to no single, definite and precise answer. He (*sic*) knows that lawyers differ time and again in the opinions they express on the selfsame issues...Does it make much sense then to suppose that he (*sic*) will take for granted the correctness of all the legal advice he (*sic*) happens to receive, that doubts or qualms about any he (*sic*) gets will never enter his (*sic*) mind?"(1146D–G)

Having thus inflected the standard of reasonableness with a high level of stringency, the learned judge proceeded to qualify it as follows: "The reasonable man (*sic*) I have sketched has perceptions too keen to be shared and standards too high to be met by somebody from a humble walk of life who is not comparable with him (*sic*) in either sophistication or experience."(1146I)

The approach taken by Didcott J in *Waglines* has recently been subject to criticism in *S v Claasens 1992 (2) SACR 434 (T)*. The court, per Van Dijkhorst J, expressed its disapproval in the following terms:

> "Ek kan met eerbied nie akkoord gaan met die gedagterigting in *S v Waglines (Pty) Ltd and Another* ...dat regslui en ook Regters van mekaar verskil oor die reg, dat in die regsberoep geld *quot homines tot sententiae* en dat

> die kliënt dus nie alle regsadvies wat hy (*sic*) ontvang as korrek kan aanvaar nie. Dit gaan myns insiens te ver en stel die arme kliënt gelyk aan 'n hipochondris wat van dokter na kwaksalwer na geloofsgeneser swerf en nooit rus of genesing vind nie."(440c)

It is submitted, with respect, that the learned judge in *Claasens*, by failing to consider the *dictum* by Didcott J at 1146I, in effect misinterpreted the crux of his argument. (In any event, the decision in *Claasens*, being a judgment of the Transvaal Provincial Division, is, like *Waglines*, not authoritative but merely persuasive.) It is submitted that the cumulative effect of the above-quoted excerpts from the decision in *Waglines* constitutes a subjectivisation of the requirement of reasonableness in the sense that it is seen as being anchored in the socio-political and cultural matrix of relations that influences the conduct of the accused in the particular circumstances of the case.

Arzt has argued that "...reliance on reasonable though erroneous information is the prime example in German case law of invincible *error iuris*."[84] He then adverts to the tension that exists in the case-law between the need to take cognisance of the fact that legal advice can be purchased and the need to protect honest citizens who seek honest advice. He is critical of the courts' tendency to "...decide the case at hand on some other ground, so as to avoid the touchy issue of distinguishing crooked lawyers from reliable ones giving honest advice."[85]

It is submitted that this tension may be eased in practice by the utilisation of expert witnesses at the stage prior to conviction to adduce evidence concerning the level of legal knowledge and general education in a given community. As was stated at the outset of this paper, such witnesses could include persons who are either long-standing members or active participants in the socio-cultural life of the community in question. It is important to note, however, that, since the normative concept of reasonableness embodies both objective and subjective components, the use of expert evidence will only assist the presiding officer in the determination of the objective criteria. A consideration of the subjective circumstances of the accused is therefore also necessary in order to ensure the attainment of *social justice* in a particular case. The ultimate determination of the issue by the presiding officer should thus be premised upon a consideration of both such objective and subjective criteria.

It is submitted that, provided that the dilemma adverted to by Arzt is alleviated, and provided that the *Unvermeidbarkeitsdoktrin* is modified to approximate the criterion of reasonableness, the normative approach to the issue of legal advice may profitably be implemented in South Africa. Its implementation would entail the consequence that the above *dictum* by Didcott J in *Waglines* would, rightly it is submitted, be applicable not only to crimes requiring negligence, but also to crimes requiring intention.

## H. CONCLUSION

The theoretical and methodological superiority of the German approach to the doctrine of mistake has, it is submitted, been amply documented in the present paper. Its practical utility has been illustrated with reference to the issue of official abuse of power and the problem of reliance on erroneous legal advice. Its stringency in relation to the former operates to serve the needs of the social collectivity by curtailing such abuse, while its flexibility in relation to the latter facilitates the recognition of individual liberties in a heterogeneous society. It should, therefore, be apparent that the normative doctrine of mistake, suitably modified to incorporate the criterion of reasonableness rather than the criterion of unavoidability, can, with the aid of the law of evidence, be utilised to achieve *social justice* in the adjudication of penumbral cases. It is accordingly submitted that the present discord between legal theory and socio-cultural reality will be alleviated by the reception of the normative approach in South Africa.

**END-NOTES**

1. Wolhuter: *Justification and Excuse* (Unpublished paper) 1991 U.C.T.: LLM in Criminology and Criminal Justice p29
2. *ibid*
3. Fletcher: *Rethinking Criminal Law* p487
4. Snyman: *The finalistic theory of an act in Criminal law* in 1979 SACC p4
5. Arzt: *Ignorance or Mistake of Law* in 1976 American Journal of Comparative Law p654
6. Naucke: *An insider's perspective on the significance of German Criminal law theory's general system for analysing criminal acts* in 1984 B.Y.U. Law Review p311
7. *op cit* p317
8. *op cit* p317-8
9. *op cit* p319
10. *op cit* p321
11. Arzt: (note 5) p677
12. Snyman: (note 4) p8
13. *op cit* p10
14. Arzt: (note 5) p655
15. *ibid*
16. Snyman: Criminal Law p149
17. Arzt: (note 5) p657
18. Snyman: (note 16) p217
19. Van Rooyen: *Regsdwaling en dolus in die Strafreg* in 1974 THRHR p29
20. *op cit* p30
21. Visser and Vorster: General Principles of South African Criminal law through the cases 3rd ed p494
22. Stassen: *S v De Blom 1977 (3) SA 513 (A)* in 1977 TSAR p262-263
23. Whiting: *Changing the face of Mens Rea* in 1978 SALJ p6
24. Visser and Vorster: (note 21) p504

25. Rabie: *Aspects of the distinction between ignorance or mistake of fact and ignorance of mistake of law in criminal law* in 1985 THRHR p335; p342

26. Visser and Vorster: (note 21) p505

27. Snyman: *Normatiewe skuld en redelik verwagbare gedrag* in 1991 THRHR p15-16

28. Jescheck: Lehrbuch des Strafrechts 3rd ed p385
(Own translation: "Criminal capacity and awareness of unlawfulness are criteria for the establishment of guilt. If the actor does not have criminal capacity or if he acts in consequence of an unavoidable mistake of law, guilt is lacking".)

29. Botha: Wederregtelikheidsbewussyn in die Strafreg p157

30. Arzt: *The Problem of Mistake of Law* in Eser and Fletcher (eds): Justification and Excuse Vol 2 p1041

31. Botha: (note 29) p158

32. *op cit* p152

33. *op cit* p155

34. Arzt: (note 5) p660

35. Jescheck: (note 28) p246
(Own translation: "An error concerning the definition of the proscription occurs when someone perpetrates an act without knowing about a circumstance that is included in the statutory definition of the proscription. These circumstances comprise chiefly all the objective criteria of the statutory definition of the proscription.")

36. Arzt: (note 30) p1039

37. Jescheck: (note 28) p368
(Own translation: "A *Verbotsirrtum* is an error concerning the unlawfulness of the act. The actor knows what he is doing but erroneously assumes it is allowed. *Verbotsirrtum* comprises not only a positive assumption that the act is allowed, but also a failure to form a conception about the lawful nature of the act.")

38. *op cit* p365
(Own translation: "If the actor lacks knowledge of unlawfulness he acts without guilt, if such lack of knowledge was unavoidable. If the actor could have avoided the error, punishment may be mitigated in terms of s49(1).")

39. Fletcher: (note 3) p750

40. Jescheck: (note 28) p373
(Own translation:
*Bestandsirrtum*: "The actor erroneously assumes the existence of a justification ground which is not recognised by the legal system."
*Grenzirrtum*: "The actor misconstrues the lawful limits of a recognized justification ground."

*Erlaubnistätbestandsirrtum*: "The third case, where the actor erroneously assumes the existence of circumstances which, if they had existed, would have jusitifed the act, is an error *sui generis*.")

41. Fletcher: (note 3) p751

42. Jescheck: (note 28) p410
(Own translation: "An error about the existence of a ground of excuse is as meaningless as an error concerning its limits since only the Legislator can determine in which cases the actual diminution in quality of the unlawfulness or guilt of the act renders the act blameless.")

43. *op cit* p411
(Own translation: "An unavoidable error about the occurrence of a recognized ground of excuse excuses the actor, if he subjectively acts in the belief that the circumstances giving rise to the ground of excuse exist.")

44. Fletcher: (note 3) p750

45. *op cit* p751

46. *op cit* p750

47. *op cit* p751

48. Arzt: (note 5) p658

49. Jescheck: *The doctrine of Mens Rea in German Criminal law - its historical background and present state* in 1975 CILSA p118

50. Arzt: (note 5) p658

51. Arzt: (note 30) p1045

52. Botha: (note 29) p151

53. Snyman: (note 27) p16

54. *op cit* p17

55. Smith and Hogan: Criminal *Law* p207

56. Smith: *Rethinking the Defence of Mistake* in 1982 Ox Jo L S p429

57. Smith and Hogan: (note 55) p80

58. *ibid*

59. Smith: *Error and Mistake of Law* in Eser and Fletcher (eds): Justification and Excuse Vol 2 p1097

60. *op cit* p1101

61. *ibid*

62. Botha: (note 29) p195

63. *ibid*

64. *op cit* p196

65. Smith and Hogan: (note 55) p83

66. *op cit* p84

67. *ibid*

68. Ashworth: *Excusable Mistake of Law* in 1974 Criminal Law Review p653

69. Matthews: *Ignorance of the Law is no Excuse?* in 1983 Legal Studies p178

70. English Law Commission's report: *Codification of the Criminal law* 1985 p74

71. Dressler: Understanding Criminal Law p143

72. Smith: (note 59) p1111

73. *op cit* p1112

74. Snyman: *The attack on German Criminal law theory – a retort* in 1985 SALJ p128

75. Matthews: (note 69) p191-192

76. Snyman: (note 74) p129

77. Fletcher: (note 3) p732

78. De Wet and Swanepoel: Strafreg p155

79. Visser and Vorster: (note 21) p502

80. Van der Merwe: *The Cumulative effect of 'Partial Excuse' and Error Iuris – Ntuli and De Blom revisited* in 1982 SALJ p434

81. Snyman: *De Blom verwelk: error iuris weer eens in die kollig* in 1988 SACJ p458

82. Van der Merwe: (note 80) p433

83. Burchell and Hunt: South African Criminal law and Procedure Vol 1 p273

84. Arzt: (note 5) p671

85. *op cit* p673

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5. Dhlamini: *Ignorance or mistake of law as a defence in Criminal law* in 1987 THRHR p43
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